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Plausibly Willful -- Tightening Pleading Standards in FACTA Credit Card Receipt Litigation Where Only an Expiration Date Is Present

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INTRODUCTION

American consumer transactions increasingly occur via credit or debit card rather than in cash. Every day, credit card transactions generate countless receipts. Some consumers take care to shred or

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dispose of their receipts to avoid credit card fraud and identity theft.¹ Some may even notice that those receipts include only a few digits of the credit card number and no expiration date. Why then have we been told to shred our credit card receipts, when they appear to lack significant credit card information?² Today, the truncation of credit card numbers and the removal of expiration dates from credit card receipts are near ubiquitous.³ This ubiquity is a product of federal law and extensive class action litigation—litigation that continues today.⁴ In recent years, well-known companies such as Southwest Airlines,⁵ FedEx,⁶ J. Crew,⁷ Sunoco,⁸ and RadioShack⁹ have all defended against class action litigation for failure to truncate credit card numbers or remove expiration dates.

1. That consumers ought to shred credit card receipts remains common advice. *See, e.g.,* Veronica Dudley, *Tips for Safe, Secure Holiday Shopping*, FORT LEAVENWORTH LAMP (Nov. 26, 2014, 10:31 AM), <http://www.ftleavenworthlamp.com/article/20141126/NEWS/141129486/0/SEARCH?template=printart> [perma.cc/WC55-8NND]; Mort Mazor, *Residents Learn How to Deal with Identity Theft*, SUN SENTINEL (Fort Lauderdale, Fla.) (May 2, 2014), http://articles.sun-sentinel.com/2014-05-02/news/fl-cn-identity-0504-20140502_1_identity-theft-credit-report-pre-approved-credit-applications [https://perma.cc/T6FG-JJ2Z].

2. Unsigned credit card receipts with only the last four numbers of the card need not be shredded, though signed receipts still ought to be shredded as the signature could be used by fraudsters. *See* Jennifer Saranow Schultz, *Financial Tuneup: What You Need to Shred*, N.Y. TIMES: BUCKS BLOG (Mar. 30, 2010, 10:48 AM), http://bucks.blogs.nytimes.com/2010/03/30/financial-tuneup-what-you-need-to-shred/?_r=0 [https://perma.cc/5UBC-AHRL].

3. *See, e.g.,* Melody Warnick, *9 Things You Should Know About Your Credit Card Receipt*, CREDITCARDS.COM (Jan. 26, 2012), http://www.creditcards.com/credit-card-news/9-things-to-know-about-credit_card-receipts-1273.php [https://perma.cc/294Q-6VHD].

4. *See infra* Sections I.A–I.C.

5. Juan Carlos Rodriguez, *Southwest Exposed Credit Card Info on Receipts, Suit Says*, LAW360 (Nov. 28, 2012, 6:12 PM), http://www.law360.com/articles/397228/southwest-exposed-credit-card-info-on-receipts-suit-says?article_related_content=1 [https://perma.cc/5DCR-5KLG] (failure to remove expiration dates).

6. Juan Carlos Rodriguez, *FedEx Settles Customers' FACTA Suit with \$50 Gift Cards*, LAW360 (Oct. 23, 2012, 2:36 PM), http://www.law360.com/articles/388800/fedex-settles-customers-facta-suit-with-50-gift-cards?article_related_content=1 [https://perma.cc/5BL9-FGR4] (printed six digits of credit card numbers).

7. Lisa Ryan, *J. Crew Sued for Showing Credit Card Digits on Receipts*, LAW360 (Jan. 13, 2015, 5:21 PM), <http://www.law360.com/articles/610999/j-crew-sued-for-showing-credit-card-digits-on-receipts> [https://perma.cc/NAM3-4WAB] (printed nine of sixteen digits of the credit card number).

8. Christine Caulfield, *Sunoco Exposes Consumers to Identity Theft: Suit*, LAW360 (Apr. 13, 2007, 12:00 AM), http://www.law360.com/articles/22613/sunoco-exposes-consumers-to-identity-theft-suit?article_related_content=1 [https://perma.cc/7KGF-VEV2] (failure to remove expiration dates).

9. Jonathan Randles, *7th Circuit Cancels \$10 RadioShack Coupon Settlement*, LAW360 (Sept. 19, 2014, 6:41 PM), <http://www.law360.com/articles/579365/7th-circ-cancels-10-radioshack-coupon-settlement> [https://perma.cc/43TG-9D7M] (failed to remove expiration dates).

Congress passed the Fair and Accurate Credit Transactions Act of 2003¹⁰ (“FACTA”) to systematically address issues of identity theft.¹¹ By requiring the truncation of credit card numbers and the removal of expiration dates from most credit card receipts,¹² FACTA aimed to deprive identity thieves and fraudsters of a common source of credit card information.¹³ Since FACTA went into effect, the lure of attorneys’ fees and aggregated statutory damages (in class action suits) has generated much litigation and hundreds of written decisions, typically at the district court level.¹⁴ Prior to the Supreme Court’s seminal decision in *Ashcroft v. Iqbal*,¹⁵ defendants rarely succeeded in obtaining dismissal of such cases on 12(b)(6) motions to dismiss for failure to state a claim upon which relief could be granted.¹⁶ Since *Iqbal*, however, district courts have shown an increasing willingness to question the adequacy of complaints, particularly with regard to the willful violation of FACTA that plaintiffs must allege to recover statutory damages under the law.¹⁷ If a court does not find a plaintiff’s allegations of willfulness plausible, the plaintiff can only recover actual damages.¹⁸ Because consumers rarely, if ever, suffer significant actual damages from the printing of noncompliant receipts, inadequately pleading a willful violation will almost always result in dismissal of the claim.¹⁹

10. Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 (codified as amended at 15 U.S.C. §§ 1681–1681x (2012)).

11. *See infra* Section I.A.

12. For purposes of this Comment, “truncation requirement” refers only to the requirement that no more than the last five numbers of a credit card number be printed. *See* 15 U.S.C. § 1681c(g) (2012).

13. *Id.*; *see also* Credit and Debit Card Receipt Clarification Act (Clarification Act) of 2007, Pub. L. No. 110-241 § 2(a)(1), 122 Stat. 1565 (2008) (“The Fair and Accurate Credit Transactions Act . . . was enacted into law in 2003 and [one] of the purposes of such Act is to prevent criminals from obtaining access to consumers’ private financial and credit information in order to reduce identity theft and credit card fraud.”).

14. As of January 24, 2016, a Westlaw search for the relevant section of the United States Code “15 USC 1681c(g)” returns 235 written decisions. As Congress has recognized, hundreds more lawsuits have been filed. *See infra* Section I.B. “Aggregated statutory damages” means the available statutory damages multiplied by the number of members of a class. FACTA provides for statutory damages of between \$100 and \$1,000 per violation, § 1681n(a)(1)(A), in addition to the possibility of punitive damages, § 1681n(a)(2). In class action FACTA receipt requirement litigation, classes can easily exceed 10,000; 100,000; or even 1 million members, resulting in potentially massive damages awards, sometimes even exceeding \$1 billion. *See infra* notes 55–59 and accompanying text.

15. 556 U.S. 662 (2009).

16. *See infra* notes 133–37 and accompanying text.

17. *See infra* Section III.A.

18. *See* 15 U.S.C. § 1681o (2012) (“Civil liability for negligent noncompliance”).

19. *See infra* note 59 and accompanying text.

Despite FACTA's success in incentivizing retailers to remove credit card information from customer receipts, a serious question remains as to whether the costs of FACTA receipt litigation and the concomitant liability or settlements—costs which are passed on to consumers—outweigh the benefits to consumers in preventing identity theft.²⁰ This question becomes particularly acute if one considers the requirement to remove expiration dates in isolation from the truncation requirement. While the benefits of the latter are clear, the expiration date requirement provides no additional consumer benefit while creating significant compliance costs for retailers—costs ultimately borne by consumers.²¹ Given that the expiration date requirement fails any cost-benefit analysis,²² the willingness of courts to apply greater scrutiny to FACTA cases is a welcome development, at least where only the expiration date requirement has been violated.²³

It is worth noting from the outset that this Comment does not deal with the entire universe of FACTA credit card receipt requirement (§ 1681c(g))²⁴ cases. It is primarily concerned with those cases in which the plaintiff alleges that the merchant printed only the credit card's expiration date—not cases in which the credit card number alone or both the number and the expiration date were printed. This is largely because courts rarely dismiss a complaint on a motion to dismiss in which the plaintiff has alleged failure to properly

20. See *infra* Sections I.B–C.

21. See *infra* notes 56–59 and accompanying text.

22. See *infra* note 59 and accompanying text.

23. At least it ought to be a welcome development to both retailers and consumers to whom the costs of compliance and litigation are passed. The only group that stands to lose from tightening pleading standards in these cases is the plaintiffs' bar. Plaintiffs themselves see little direct benefit from FACTA litigation. The settlement scuttled by Judge Richard Posner in the *RadioShack* case is a good example of a typical FACTA settlement. There, class counsel would have received about \$1 million from the settlement while the named plaintiff would have received \$5,000, and class members would have received \$10 RadioShack coupons. See *Redman v. RadioShack Corp.*, 768 F.3d 622, 628–29 (7th Cir. 2014); see also *Keith v. Back Yard Burgers of Neb., Inc.*, No. 8:11-CV-00135, 2014 WL 4781914, at *2 (D. Neb. Sept. 23, 2014) (settling for approximately \$1.1 million for class counsel and coupons for plaintiffs); Lori Pilger, *Back Yard Burgers Agrees to Settle Lawsuit*, LINCOLN J. STAR (Sept. 19, 2014, 3:15 PM), http://journalstar.com/business/local/back-yard-burgers-agrees-to-settle-lawsuit/article_c2c4f596-8aca-5d35-be76-daf5f5e4c1b9.html [<https://perma.cc/7ZWZ-QN6J>] (“The restaurant also agreed to give out coupons for a free soft drink with the purchase of an entrée to anyone who submits a valid claim.”).

24. Section 1681c(g) of Title 15 of the U.S. Code provides the FACTA provision requiring truncation of credit card numbers and removal of expiration dates from credit card receipts. “Section 1681c(g) cases” will be used as shorthand for FACTA credit card receipt requirement litigation.

truncate the credit card number.²⁵ Courts treat these facts differently because of the more obvious risk of credit card fraud presented by credit card numbers on receipts and the greater publicity surrounding FACTA's truncation requirement.²⁶ Further, different inferences might arise where a defendant truncated the credit card number and yet printed the expiration date—e.g., that the defendant was aware of at least some of FACTA's requirements, attempted to comply, and thus violated the law negligently rather than recklessly or willfully.

Additionally, this Comment concerns itself exclusively with attempts to dismiss § 1681c(g) cases on 12(b)(6) motions to dismiss. It does so for two reasons. First, the trend in case law that this Comment discusses only emerged following the Supreme Court's creation of the "Twiqbal"²⁷ pleading standards, whose effect is limited to the 12(b)(6) motion to dismiss. Second, the 12(b)(6) motion to dismiss provides the best opportunity to limit the costs of § 1681c(g) litigation. While defendants are often successful in obtaining either summary judgment or denial of class certification in § 1681c(g) claims, both of those procedures occur later in litigation and presume a defendant willing to bear the costs of discovery. The costs of discovery result in a higher settlement value for any lawsuit that has overcome the hurdle of a motion to dismiss,²⁸ so a successful motion to dismiss better limits

25. The only exception is *Katz v. Donna Karan International, Inc.*, No. 14 Civ. 740(PAC), 2015 WL 405506 (S.D.N.Y. Jan. 29, 2015).

26. See 154 CONG. REC. 8881 (2008) (statement of Rep. Mahoney) ("[T]he publicity surrounding the passage of [FACTA], whether it was press accounts of the President's statement at the signing [or] the subsequent Federal Trade Commission press release describing the new requirements of the bill, pointed entirely to the truncation of the credit card number.").

27. "Twiqbal" is a portmanteau of "Twombly," from *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)—the Court's first heightened pleading standards case—and "Iqbal" from *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The term "Twiqbal" appears to have first been used in a published court opinion by Judge Kim R. Gibson of the United States District Court for the Western District of Pennsylvania. See *RHJ Med. Ctr., Inc. v. City of DuBois*, 754 F. Supp. 2d 723, 730 (W.D. Pa. 2010) ("That was the standard. No longer. There is a 'new sheriff in town' now policing Fed.R.Civ.P. 12(c), and his name is 'Twiqbal.'"). But the term appears to have been coined somewhat earlier. As far as this author can determine, "Twiqbal" first appears in a law review in the published transcript from a symposium held by the *Journal of Law, Economics and Policy*, published almost one year earlier than *RHJ Medical Center*. See Transcript, *Emerging Civil Justice Issues, 5th Annual Judicial Symposium on Civil Justice Issues: George Mason Judicial Education Program: December 5-7, 2010*, 7 J.L. ECON. & POL'Y 195, 200 (2010).

28. J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713, 1731 (2012) ("Asymmetrical cost imposition is usually most pronounced during the discovery process. In general, access to discovery is granted without limitation once a motion to dismiss is denied, enabling claimants to impose significant, asymmetric production costs on the opposing party. . . . Accordingly, a claimant will obtain a 'motion to dismiss premium' in proportion to any temporal or absolute asymmetrical cost

litigation costs than a motion for summary judgment or for the denial of class certification.

In that context, this Comment makes two fundamental claims. First, as an empirical matter, courts more frequently grant motions to dismiss in post-*Iqbal* § 1681c(g) cases. Second, § 1681c(g) litigation based only on an expiration date offers no consumer benefit and should be limited by the courts. Absent a legislative intervention, the trend of applying greater scrutiny to complaints on 12(b)(6) motions to dismiss presents the clearest means to mitigate the costs of § 1681c(g) litigation and is faithful to the reasoning behind *Iqbal* and *Bell Atlantic Corp. v. Twombly*.²⁹ Such scrutiny is supported by interpreting *Safeco Insurance Co. of America v. Burr*³⁰—the Supreme Court’s decision on “willfulness” in the context of FACTA—as creating an affirmative defense to liability rather than supplanting the analysis of a defendant’s subjective state of mind—which is usually required to establish the element of willfulness.

Under *Safeco*, the willfulness requirement is not met if the defendant can show reliance on a reasonable construction of an ambiguous statute.³¹ If *Safeco* creates an affirmative defense, even if a defendant cannot establish the elements of that defense (such as where the statutory text is too clear to be considered ambiguous), the plaintiff still carries a burden. The plaintiff must still make out a

imposition in the discovery stage.”); see also Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 636–38 (1989) (“Litigants with weak cases have little use for bringing the facts to light and every reason to heap costs on the adverse party—on this supposition, the one in the right. The prospect of these higher costs leads the other side to settle on favorable terms. All of the models of settlement imply that parties divide between them the gains from avoiding litigation. More discovery (better: the credible threat of more discovery) increases these ‘savings,’ which the parties share in a ratio determined by their endurance, capacity to bluff, and so on—in other words, by factors unrelated to their legal entitlements. The party in a position to threaten exhaustive discovery can claim for itself in settlement a portion of the costs that should not have been imposed in the first place.”); William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61, 101–02 (1971) (“If the payment of X by the defendant yields him a higher utility than his expected utility from a trial, a settlement will take place. This follows because one can find a payment somewhat greater than X that gives both parties a higher utility from a settlement than their expected utilities from a trial. It can further be shown that a settlement is likely when the following factors are present: (1) both parties have similar expectations on the probability that the defendant will be found liable in a trial; (2) both parties have similar estimates of the settlement, given that the defendant is found liable in a trial; (3) neither party has strong preferences for risk; (4) the costs of a trial including lawyer’s fees, time costs of the plaintiff and defendant, court fees, etc. exceed the costs of a settlement.”).

29. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

30. *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007).

31. See *id.* at 69.

prima facie case by plausibly pleading that the defendant willfully, rather than negligently, violated FACTA. Without such a showing of willfulness, statutory damages are out of the question. If, on the other hand, *Safeco* elucidates the meaning of “willfulness” for FACTA litigation, then the willfulness element necessary for statutory damages has been met if the statutory language is clear. This Comment argues that the former interpretation is most faithful to the reasoning of *Safeco* and the Supreme Court’s broader jurisprudence on willfulness in the civil context.³²

In order to place these claims in their proper context, Part I addresses FACTA’s requirements, the *Safeco* decision’s standard of willfulness, the costs and dubious benefits of class action FACTA litigation, and the Supreme Court’s recent jurisprudence on pleading standards. Part II provides an overview of pre-*Iqbal* FACTA case law. Part III analyzes post-*Iqbal* case law and establishes the increasing frequency with which courts grant motions to dismiss. Part IV shows that competing interpretations of *Safeco* underlie much of the FACTA case law. It goes on to argue that *Safeco* should be understood as supplementing rather than supplanting the traditional subjective analysis of a defendant’s state of mind in showing willfulness. The Comment concludes by briefly considering potential legislative remedies to the costly litigation caused by FACTA’s expiration date removal requirement.

I. BACKGROUND

Before addressing the specific claims of this Comment, it is necessary to examine the statutory background of FACTA litigation, the realities of class action § 1681c(g) litigation, the case law establishing what constitutes “willfulness,” and the standards for a 12(b)(6) motion to dismiss. Sections I.A and I.B will examine FACTA and its underlying policies, as well as the reasons for the temporary safe harbor Congress later created for violations of the expiration date requirement. Next, Section I.C will explore the realities of § 1681c(g) litigation, particularly the massive liability that defendants face from the aggregation of statutory damages via class action suits. Third, because the recovery of statutory damages depends on showing that a defendant willfully violated FACTA, Section I.D will explore *Safeco*, the Supreme Court decision establishing the meaning of willfulness in FACTA cases. Finally, Section I.E will examine the “new” pleading standards established in

32. See *infra* Part IV.

Twombly and *Iqbal* in order to better inform the later discussion of pre- and post-*Iqbal* § 1681c(g) case law.

A. *The Fair and Accurate Credit Transactions Act*

Congress passed FACTA on December 4, 2003, amending the Fair Credit Reporting Act (the “FCRA”).³³ FACTA was intended to address identity theft by, among other provisions, requiring lenders to identify and respond to possible indications of identity theft, giving consumers greater control over their credit history and information, and establishing the rights of identity theft victims.³⁴ For example, FACTA’s “red flag guidelines” require that financial institutions not issue a replacement credit card shortly after a change of address on an account—a common ploy used by credit card fraudsters—without first sending a notification to the former address, contacting the cardholder, or otherwise verifying the change of address.³⁵ FACTA also requires merchants to truncate credit card numbers and to remove expiration dates from certain receipts given to consumers:

[N]o person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction. . . . This subsection shall apply only to receipts that are electronically printed, and shall not apply to transactions in which the sole means of recording a credit card or debit card account number is by handwriting or by an imprint or copy of the card.³⁶

Before FACTA went into effect, consumer receipts had proven to be a gold mine for enterprising criminals who could easily retrieve discarded receipts.³⁷ By eliminating this source of credit card information, Congress hoped to reduce credit card fraud.³⁸

33. Fair and Accurate Credit Transactions Act (FACTA) of 2003, Pub. L. No. 108-159, 117 Stat. 1952 (codified as amended at 15 U.S.C. §§ 1681–1681x (2012)).

34. See 15 U.S.C. §§ 1681–1681x (2012).

35. *Id.* § 1681m(e)(1)(C).

36. *Id.* § 1681c(g)(1)–(2).

37. See *Protecting Against Credit Card Fraud*, FTC: CONSUMER INFO. (July 2012), <http://www.consumer.ftc.gov/articles/0216-protecting-against-credit-card-fraud> [<https://perma.cc/5MX5-69WE>].

38. See 149 CONG. REC. H12198-01 (2003) (comments of Rep. Maloney). *But see* Edward A. Morse & Vasant Raval, *Private Ordering in Light of the Law: Achieving Consumer Protection Through Payment Card Security Measures*, 10 DEPAUL BUS. & COM. L.J. 213, 224–25, 254 (2012) (noting that merchants, rather than consumers, directly bear the costs of fraudulent transactions).

However, Congress did not intend FACTA to cover all credit card receipts.³⁹ The statute both limits its coverage to “electronically printed” receipts and expressly exempts handwritten receipts and receipts produced by carbon imprint.⁴⁰ This exemption appears to be based on a judgment that the decreasing frequency of the use of such techniques did not justify imposing the costs of new point-of-sale systems on merchants who depended on these older methods.⁴¹ Further, the “electronically printed” language has been widely interpreted to exclude receipts for online transactions as not being printed “at the point of the sale.”⁴² Congress also provided a three-year phase-in period from the date of enactment before FACTA’s requirements would go into full effect for point-of-sale devices in use before 2005.⁴³ This phase-in period provided merchants with an opportunity to bring older point-of-sale systems into compliance with FACTA’s requirements.⁴⁴ At the time the law went into effect, many merchants were not yet in full compliance, particularly as to the requirement to remove credit card expiration dates from receipts.⁴⁵

FACTA provides for the recovery of damages based on either negligent or willful violations of the law’s requirements.⁴⁶ For negligent violations, a plaintiff may recover only actual damages,⁴⁷ whereas, unless actual damages are greater, willful violations can result in statutory damages from \$100 to \$1,000,⁴⁸ in addition to any punitive damages awarded.⁴⁹ In either case, a successful plaintiff may

39. See § 1681c(g)(2) (“This subsection shall apply only to receipts that are electronically printed, and shall not apply to transactions in which the sole means of recording a credit card or debit card account number is by handwriting or by an imprint or copy of the card.”).

40. *Id.*

41. See Morse & Raval, *supra* note 38, at 254 (“[T]his restrictive approach toward reducing security risks may be justified when the expected consumer harm (and merchant losses) from reduced access to payment options may outweigh the limited marginal risk from the low-volume and high-cost form of identity theft based on carbon forms.”).

42. See, e.g., Shlahitichman v. 1-800 Contacts, Inc., 615 F.3d 794, 798, 802 (7th Cir. 2010) (citing district courts reaching the same conclusion), *cert. denied*, 131 S. Ct. 1007 (2011).

43. § 1681c(g)(3) (requiring that devices brought online beginning January 1, 2005, be FACTA compliant).

44. *See id.*

45. Credit and Debit Card Receipt Clarification Act (Clarification Act) of 2007, Pub. L. No. 110-241, 122 Stat. 1565 (2008); *see also infra* note 54.

46. §§ 1681n, 1681o. According to *Safeco*, a willful violation is either a reckless or knowing violation of FACTA’s requirements. *See infra* note 80 and accompanying text.

47. *Id.* § 1681o(a)(1).

48. *Id.* § 1681n(a)(1)(A).

49. *Id.* § 1681n(a)(2).

obtain costs and attorney's fees from the defendant.⁵⁰ Additionally, FACTA imposes no cap on total damages, whether as to an individual plaintiff or in the aggregate.⁵¹ Accordingly, § 1681c(g) violators are an attractive target for enterprising class action counsel because of the possibility of obtaining attorney's fees and the repeating nature of FACTA violations, viz., that a noncompliant point-of-sale system will continually print noncompliant receipts, each potentially enlarging the class of plaintiffs.⁵² Many businesses discovered this after § 1681c(g)'s requirements became effective and § 1681c(g) lawsuits flooded federal courts.

B. The Credit and Debit Card Receipt Clarification Act of 2007

In response to the rash of lawsuits that followed the truncation requirement's effective date, Congress passed the Credit and Debit Card Receipt Clarification Act of 2007 (the "Clarification Act").⁵³ While retailers and point-of-sale providers had largely understood that FACTA requires credit card numbers to be truncated on electronic receipts generated at the point of sale, many failed to understand that FACTA also requires the removal of expiration dates.⁵⁴ This misunderstanding appears to have stemmed from the fact that even the government's own publicity regarding the new requirements focused entirely on the credit card number truncation requirement.⁵⁵ As a result of retail merchants' failure to understand FACTA's requirements, many noncompliant receipts were printed, and plaintiffs brought hundreds of lawsuits alleging willful violations of FACTA by the printing of credit card receipts with expiration dates.⁵⁶ Congress recognized the lack of consumer benefit from such

50. *Id.* §§ 1681n(a)(3), 1681o(a)(2).

51. *See id.* §§ 1681n, 1681o.

52. What is printed on a receipt is determined by how a point of sale device is configured. Telephone Interview with Jeffrey J. Hawkins, Exec. Dir., Glob. Software Dev., Toshiba Global Commerce Solutions, Inc. (Feb. 3, 2015). A device programmed to print all the digits of a credit number or to print a card's expiration date will continually print until it is reconfigured to do otherwise. The size of the class will be especially large if a faulty configuration is used across an entire retail chain as opposed to just at one location—every device in every location will generate noncompliant receipts for all consumer transactions that take place so long as the devices are improperly configured.

53. Credit and Debit Card Receipt Clarification Act (Clarification Act) of 2007, Pub. L. No. 110-241, 122 Stat. 1565 (2008).

54. *See* 154 CONG. REC. 8881 (2008) (statement of Rep. Mahoney) ("The overwhelming majority of businesses believed that they were in compliance with this provision of the law by truncating the card number and printing the expiration date of the credit card.").

55. *See id.*

56. Clarification Act § 2(a)(4).

lawsuits and passed the Clarification Act to create a temporary safe harbor against lawsuits alleging willful violations of the expiration date requirement for the period from FACTA's enactment in December 2004 to the enactment of the Clarification Act on June 3, 2008.⁵⁷

In addition to the safe harbor provision it enacted, Congress made a number of findings of fact:

- That merchants had widely understood the statute to require truncation of the credit card number or removal of the expiration date, rather than requiring both;
- That hundreds of lawsuits were filed on the basis of an expiration date alone, none of which contained allegations of harm to any consumer's identity;
- That experts agreed that truncation of the card number rendered removal of the expiration date superfluous, such that removal of the expiration date does not provide any benefit to consumers in preventing identity theft or credit card fraud; and
- That the widespread litigation represented a "significant burden" on merchants, the costs of which would likely be passed on to consumers, creating a true harm to consumers.⁵⁸

These findings establish that the expiration date requirement fails to provide additional consumer protection while simultaneously creating significant litigation costs for merchants.⁵⁹

Further, in the Clarification Act's purpose clause, Congress labeled lawsuits based only on a printed expiration date without an accompanying allegation of actual harm as "abusive," given the lack of additional consumer protection generated by requiring removal of expiration dates and the likely harm to consumers via higher prices resulting from the additional removal requirement and resulting litigation.⁶⁰ As evinced by the limited temporal nature of the safe-harbor provision, however, Congress did not amend the statute to require actual damages for a suit based only on the presence of the expiration date or otherwise put an end to such lawsuits.⁶¹ Merchants are thus left in the strange position of having to ensure compliance

57. 15 U.S.C. § 1681n(d) (2012).

58. Clarification Act § 2(a).

59. *See id.*

60. *Id.* § 2(b).

61. *See id.* § 3(a).

with a requirement that offers little to no consumer benefit or else face potentially massive liability for noncompliance via class action litigation.

C. *Class Action FACTA Litigation*

All, or nearly all, § 1681c(g) suits allege willful violations and seek to obtain statutory rather than actual damages.⁶² Statutory damages, combined with the repeating nature of FACTA violations—point-of-sale systems are programmed to always print certain information on receipts and if incorrectly programmed will print noncompliant receipts for all transactions—create an attractive fact pattern for class action plaintiffs’ attorneys.⁶³ Sometimes the same plaintiffs and attorneys may file multiple lawsuits against different defendants, and the plaintiff may be an employee or relative of an employee of the law firm.⁶⁴ This behavior suggests that FACTA powerfully incentivizes plaintiffs’ attorneys to seek out § 1681c(g) violations, essentially acting as “bounty hunters.”⁶⁵ Such conduct is unsurprising given the potentially massive liability and the correspondingly higher settlement value of even weak § 1681c(g) cases. For example, in one case, the potential class included 2.9 million consumers, bringing potential statutory damages to between \$290 million and \$2.9 billion—a powerful incentive for

62. *See id.* § 2(a)(4). In the course of his own research, this author has never found a case alleging actual damages, except where plaintiffs’ claims for willful violation were foreclosed by the Clarification Act. *See, e.g., Aliano v. Amerigas Partners, L.P.*, No. 07 C 4110, 2009 WL 635547, at *2 (N.D. Ill. Mar. 12, 2009) (citing similar cases). To speculate, the lack of cases alleging actual damage may result from the fact that merchants, rather than consumers, bear the costs of fraudulent transactions and, additionally, that the information on a credit card receipt is probably insufficient for the purposes of identity thieves. *See Morse & Raval, supra* note 38, at 224–25.

63. *See* Clarification Act § 2(a)(4) (noting that “hundreds of lawsuits were filed” alleging willful violation of FACTA “almost immediately after the deadline for compliance passed”).

64. *See, e.g., Ehrheart v. Lifetime Brands, Inc.*, 498 F. Supp. 2d 753, 753 (E.D. Pa. 2007) (Jennifer Ehrheart, represented by Gary F. Lynch et al.); *Ehrheart v. Verizon Wireless*, 547 F. Supp. 2d 463, 463 (W.D. Pa. 2007) (Nicole Ehrheart, represented by Gary F. Lynch et al.); *Ehrheart v. Bose Corp.*, No. 07-350, 2008 WL 64491, at *1 (W.D. Pa. Dec. 10, 2007) (Nicole Ehrheart represented by Gary F. Lynch et al.). According to LinkedIn, a Jennifer Ehrheart is a staff accountant at Carlson Lynch Ltd., a law firm of which Gary F. Lynch is a founding partner. Jennifer Ehrheart, LINKEDIN, <https://www.linkedin.com/pub/jennifer-ehrheart/42/589/93b> (last visited Jan. 24, 2016) [<https://perma.cc/6FK3-MXZT> (dark archive)]; Gary F. Lynch, CARLSON LYNCH, <http://carlsonlynch.com/profiles/GaryLynch> (last visited Jan. 24, 2016) [<https://perma.cc/7UNT-A5B8>].

65. Morse & Raval, *supra* note 38, at 256.

entrepreneurial plaintiffs' attorneys to file suit and for risk-averse corporations to settle.⁶⁶

These lawsuits resemble a kind of strike suit—i.e., “suits brought to force settlement, regardless of merit, merely because the risk of loss is too great.”⁶⁷ Usually, “strike suit” denotes a shareholder derivative action.⁶⁸ But, whereas a shareholder derivative suit is not necessarily abusive,⁶⁹ Congress itself has recognized that there is no consumer benefit from suits based on the inclusion of expiration dates on credit card receipts.⁷⁰ Indeed, even suits based on the credit card number truncation requirement may offer dubious benefits.⁷¹ For example, consider the case of a movie theatre company that printed 290,000 receipts containing the first four and last four digits of the credit cards used.⁷² Despite failing to comply with the law's requirement to include no more than the last five digits, in this case there would still be 100 million possible combinations for the remaining eight digits, leaving aside the additional combinations when accounting for the possible expiration dates.⁷³ Further, no actual damages were ever shown, yet the movie theatre company faced potential statutory damages of \$29 million to \$290 million.⁷⁴

While such potential awards speak to FACTA's deterrent effect, such a powerful incentive probably results in disproportionate investment in compliance with respect to the near-zero risk of harm to consumers from expiration dates.⁷⁵ These costs, along with the

66. *Lopez v. KB Toys Retail, Inc.*, No. CV 07-144-JFW (CWx), 2007 U.S. Dist. LEXIS 82025, at *14 (C.D. Cal. July 17, 2007).

67. Michael E. Chaplin, *What's So Fair About the Fair and Accurate Credit Transactions Act?*, 92 MARQ. L. REV. 307, 324–25 (2008).

68. *Suit*, BLACK'S LAW DICTIONARY (10th ed. 2014).

69. See Merritt B. Fox, *Required Disclosure and Corporate Governance*, 62 LAW & CONTEMP. PROBS. 113, 119 (1999) (“The primary method for enforcing management's fiduciary duties is the shareholder derivative action.”).

70. See Credit and Debit Card Receipt Clarification Act (Clarification Act) of 2007, Pub. L. No. 110-241 § 2(a)(6), 122 Stat. 1565 (2008).

71. See Morse & Raval, *supra* note 38, at 254–56.

72. *Id.* at 255 (citing *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708 (9th Cir. 2010)). It is unclear from FACTA's legislative history why Congress drew the line at no more than five digits. It may be that five was judged to be the maximum number of digits a consumer would need to differentiate one card from another without giving away too much of the account number. Of course, much of legislative line drawing results in problems of over- or under-inclusiveness.

73. *Id.*

74. To elaborate: 290,000 printed receipts multiplied by the range of possible statutory damages per violation of \$100 to \$1000 equals \$29 million to \$290 million. See 15 U.S.C. § 1681c(g) (2012); Morse & Raval, *supra* note 38, at 255 (citing *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708 (9th Cir. 2010)).

75. Morse & Raval, *supra* note 38, at 256.

costs of litigation and settlements spurred on by the “bounty” of windfall statutory damages, are ultimately borne by consumers.⁷⁶ In light of these incentives to settle, defendants are unlikely to pursue litigation into discovery. Yet even pre-*Iqbal* defendants were not entirely without defenses against allegations of a willful violation of § 1681c(g).

D. Safeco—“Willfulness” in FACTA Litigation

Section 1681c(g) defendants have attempted to raise a variety of defenses, including attacking plaintiffs’ Article III standing for lack of injury in fact, as well as challenging FACTA’s damages provisions as violating the Due Process Clause of the Fifth Amendment for being unconstitutionally vague or for the statutory damages being unduly punitive in proportion to actual damages.⁷⁷ With one exception, federal courts have rejected such constitutional challenges to the law.⁷⁸ Additionally, defendants often successfully challenge class certification, though a discussion of these efforts is beyond the scope of this Comment, particularly because class certification is usually addressed after a 12(b)(6) motion has been rejected.⁷⁹

Given the failure of these constitutional challenges, a defendant’s best recourse on a motion to dismiss is to argue that the plaintiff has not adequately pleaded the willfulness element necessary for the recovery of statutory damages. Accordingly, the success of a 12(b)(6)

76. *Id.*

77. *See, e.g.*, *Grimes v. Rave Motion Pictures Birmingham, L.L.C.*, 552 F. Supp. 2d 1302, 1305–09 (N.D. Ala. 2008) (dismissing four cases on summary judgment and holding FACTA unconstitutionally vague), *vacated*, *Harris v. Mex. Specialty Foods*, 564 F.3d 1301 (11th Cir. 2009); *Amason v. Kangaroo Express*, No. 7:09-CV-2117-RDP, 2013 WL 985536, at *3–4 (N.D. Ala. Mar. 11, 2013) (rejecting a challenge to plaintiff’s Article III standing and noting that other district courts have examined the question and reached the same result).

78. The exception is *Grimes*. 552 F. Supp. 2d at 1305–09. For a case rejecting various constitutional arguments where the United States intervened to defend the statute, see *Irvine v. 233 Skydeck, LLC*, 597 F. Supp. 2d 799, 802–04 (N.D. Ill. 2009). The *Irvine* court rejected the vagueness challenge, observing that providing a range of available statutory damages is commonplace and routinely upheld as understandable to an ordinary person operating a business. *Id.* at 803. In response to the excessively punitive damages argument, the court noted that courts routinely reduce excessive awards and, in any case, it was premature to make such an as-applied challenge on a motion to dismiss. *Id.* at 804.

79. *See, e.g.*, *Ticknor v. Rouse’s Enters., L.L.C.*, No. 14-30550, 592 Fed. App’x. 276, 2014 WL 6440397, at *1 (5th Cir. 2014) (affirming denial of class certification on predominance and superiority grounds); *see also* Holly S. Hosford, *Avoiding Annihilation: Why Trial Judges Should Refuse to Certify a FACTA Class Action for Statutory Damages Where the Recovery Would Likely Leave the Defendant Facing Imminent Insolvency*, 81 MISS. L.J. 1941, 1942–44 (2012) (arguing for denial of class certification given the potential for annihilative aggregate statutory damages).

motion to dismiss will depend on how “willfulness” is defined. The Supreme Court established in *Safeco Insurance Co. of America v. Burr* that, in the context of FACTA litigation, “willfulness” includes both knowing violations of the law’s provisions as well as violations caused by reckless disregard of § 1681c(g).⁸⁰

In *Safeco*—a consolidation of two similar cases from the Ninth Circuit—the defendant insurance companies were sued for violations of FACTA provisions unrelated to the credit card requirements, specifically for failure to give notice to a consumer that an adverse action (offering higher than the best available insurance premiums) was taken based on the consumers’ credit reports.⁸¹ Following grants of summary judgment for the defendants in the district courts, the Ninth Circuit vacated and remanded both cases, holding that actions taken in reckless disregard of consumers’ rights under FACTA constitute willful violations.⁸² The Supreme Court took up the case to resolve a circuit split as to whether “willfulness” reached not only knowing and intentional violations of FACTA but also those occurring due to reckless disregard.⁸³

After agreeing with the Ninth Circuit that “willfulness” under FACTA includes reckless disregard, the Court went on to define “reckless disregard.”⁸⁴ Making clear that it was not “deviat[ing] from the common law understanding” of recklessness, the Court unanimously held that

a company subject to the FCRA does not act in reckless disregard . . . unless the action is not only a violation under a reasonable reading of the statute’s terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless.⁸⁵

In other words, conduct based on an interpretation of the statute that is not “objectively unreasonable” does not rise to the level of reckless disregard, even if the interpretation is mistaken.⁸⁶

80. *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 56–60 (2007).

81. *Id.* at 54–56.

82. *Id.* at 55–56.

83. *Id.* at 56 & n.8.

84. *Id.* at 68–70.

85. *Id.* at 69.

86. *Id.* at 70 (“Given this dearth of guidance and the less-than-pellucid statutory text, Safeco’s reading was not objectively unreasonable, and so falls well short of raising the ‘unjustifiably high risk’ of violating the statute necessary for reckless liability.”).

Given the relative clarity of § 1681c(g), *Safeco* has been of limited utility to defendants in that context. Some courts have even interpreted it to foreclose dismissal of complaints alleging inclusion of an expiration date on credit card receipts because the truncation requirements are clear.⁸⁷ *Safeco* does occasionally aid defendants where there is a novel or unusual fact pattern, such as where the defendant printed the month but not the year of a card's expiration date.⁸⁸ In such cases, courts examine (1) whether the defendant's interpretation has some basis in the text of the statute; (2) whether federal courts of appeal or administrative agencies have authoritatively interpreted the language in question; and (3) in a court of appeal, whether the district court found the defendant's interpretation persuasive.⁸⁹

Because defendants have largely been unable to use a *Safeco* defense on a 12(b)(6) motion to dismiss, they have turned to attacking the complaint as failing to adequately plead a willful violation of FACTA.⁹⁰ This has become the most common and most successful line of argument for disposing of § 1681c(g) suits before entering into discovery.⁹¹ But this success is a relatively new development in the case law—one that only fully took shape following the Supreme Court's new pleading standards jurisprudence in the late 2000s.⁹²

E. *Twombly* and *Iqbal*—"New" Pleading Standards

A full discussion of the latest FACTA case law is incomplete without the context of the development of federal pleading standards, particularly since the *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* decisions. Recent § 1681c(g) cases granting motions to dismiss rely in part on more carefully scrutinizing complaints in light of

87. *E.g.*, *Korman v. Walking Co.*, 503 F. Supp. 2d 755, 761–62 (E.D. Pa. 2007).

88. *See* *Long v. Tommy Hilfiger U.S.A.*, 671 F.3d 371, 377 (3d Cir. 2012) (holding that printing the month did violate FACTA but that the violation was not willful because it was based on a mistaken but not objectively unreasonable interpretation of the statute); *see also* *Redman v. RadioShack Corp.*, 768 F.3d 622, 638–40 (7th Cir. 2014) (Posner, J.) (printing the month alone may have violated FACTA but was not willful because it was based on "a permissible interpretation of an ambiguous statute").

89. *See* *Safeco*, 551 U.S. at 70; *Redman*, 768 F.3d at 639–40. *See generally* S.L. Owens, *Avoiding the Urkel Defense (Did I Do That?): How Safeco Has (and Has Not) Begun to Provide an Affirmative Defense Against Statutory Willfulness*, 82 DEF. COUNS. J. 51 (2015) (describing the use of the *Safeco* defense in the context of various federal statutes, including FACTA).

90. *See infra* Parts II–III.

91. *Infra* Part III.

92. *Id.*

Twombly and *Iqbal*.⁹³ Cases denying motions to dismiss, on the other hand, typically fail to engage in a rigorous “*Twiqbal*” analysis.⁹⁴ The opposing views playing out in the FACTA case law could be considered a mere flash point in a larger debate about the state of pleading standards after *Twombly* and *Iqbal* and whether those two cases are to be construed in continuity with or as a break from pre-*Twiqbal* pleading standards.⁹⁵

Before the *Twiqbal* decisions, the pleading standard established by the Federal Rules of Civil Procedure was known as “notice pleading.”⁹⁶ Unlike the earlier code pleading that required detailed factual allegations,⁹⁷ notice pleading was meant to provide no more than notice to the parties and the court—that is, a general idea of the claim being made and the basis for the relief requested.⁹⁸ Accordingly, Rule 8 requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.”⁹⁹ This loose standard received its classical interpretation in *Conley v. Gibson*.¹⁰⁰ “In appraising the sufficiency of the complaint we follow . . . the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim.”¹⁰¹ But *Twombly* and *Iqbal* dispensed with this language and cast into doubt the validity of notice pleading.

93. See, e.g., *Crupar-Weinmann v. Paris Baguette Am., Inc. (Paris Baguette I)*, No. 13 Civ. 7013(JSR), 2014 WL 2990110, at *4–5 (S.D.N.Y. June 30, 2014) (holding that plaintiff’s allegations of a willful violation of § 1681c(g) were implausible), *appeal docketed*, No. 14-3709 (2d Cir. Oct. 2, 2014).

94. See *infra* note 156.

95. See, e.g., Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 127–30 (2010) (arguing that *Twombly* and *Iqbal* do represent a significant shift in pleading standards, one that threatens public access to federal courts for the redress of wrongs, in sharp contrast to the notice pleading approach exemplified by the classic civil procedure case of *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944)); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1298 (2010) (“The only aspect of prior case law that *Twombly* and *Iqbal* set aside was a misunderstood fifty-year-old phrase whose real meaning was never called into question.”).

96. See *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

97. Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 459–60 (1943) (noting that although adopted to reform the overly detailed and complex common law pleading, code pleading had shown the same tendency to ever-greater factual specificity and detail as its predecessor).

98. *Id.* at 460.

99. FED. R. CIV. P. 8(a)(2).

100. *Conley*, 355 U.S. at 41.

101. *Id.* at 45–46.

In *Twombly*, consumers sued local telephone companies—“incumbent local exchange carriers” that had once held regional monopolies on local phone service but were later required to open their networks to competing phone services—alleging patterns of parallel conduct produced by collusion not to compete with each other in order to restrain the entry of new competition.¹⁰² The Southern District of New York dismissed the case on a 12(b)(6) motion, holding that mere allegation of parallel business conduct was insufficient to state a claim under § 1 of the Sherman Antitrust Act.¹⁰³ On appeal, the Second Circuit reversed.¹⁰⁴ Relying on the classic language from *Conley*, the Second Circuit held that the district court had employed too stringent a standard in evaluating the complaint.¹⁰⁵ The Supreme Court reversed.¹⁰⁶

In reversing the Second Circuit, the Court held that a complaint must contain “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”¹⁰⁷ The Court continued, “[f]actual allegations must be enough to raise a right to relief above the speculative level,” though such allegations must still be assumed to be true, however improbable.¹⁰⁸ Accordingly, mere parallel conduct and a “bare assertion of conspiracy will not suffice” because such allegations raise only a possibility of entitlement to relief—they do not render the claim plausible.¹⁰⁹ The Court went on to disavow the “no set of facts” language from *Conley* upon which the Second Circuit depended, characterizing it as an “incomplete, negative gloss on an accepted pleading standard” that described “the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading.”¹¹⁰

Beyond the consensus in the legal community that *Twombly* represented some kind of change, questions remained about the decision’s breadth.¹¹¹ Specifically, it was unclear whether a broad shift in pleading standards had occurred or whether *Twombly* was

102. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 549–51 (2007).

103. *Id.* at 552.

104. *Id.* at 553.

105. *Id.* (holding that to dismiss the complaint, it would be necessary “to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence” (quoting *Twombly v. Bell Atl. Corp.*, 425 F.3d 99, 114 (2d Cir. 2005))).

106. *Id.* at 570.

107. *Id.* at 555.

108. *Id.*

109. *Id.* at 556–57.

110. *Id.* at 562–63.

111. Steinman, *supra* note 95, at 1305–06.

somehow limited to the antitrust context.¹¹² But in 2009, the Supreme Court made clear in *Iqbal* that *Twombly* concerned the pleading standards applicable not just to antitrust cases, but to all cases.¹¹³

In *Iqbal*, plaintiff Javid Iqbal sued John Ashcroft, the former U.S. Attorney General, and Robert Mueller, the former Director of the FBI, alleging that, following his arrest in the wake of the September 11 attacks, Iqbal had been deprived of his constitutional rights.¹¹⁴ Specifically, Iqbal alleged that “harsh conditions of confinement” were imposed on the basis of his “race, religion, or national origin.”¹¹⁵ Before *Twombly* was decided, the Eastern District of New York, relying on the “no set of facts” language from *Conley*,¹¹⁶ denied the defendant’s motion to dismiss on the basis of qualified immunity, after which an interlocutory appeal was filed.¹¹⁷ The Second Circuit affirmed, reasoning that while *Twombly* had retired the *Conley* formula, the new standard only applied in certain “contexts where [factual] amplification is needed to render the claim plausible.”¹¹⁸ But Iqbal’s case did present such a context, and the Supreme Court reversed.¹¹⁹

Reversing the Second Circuit, the Supreme Court emphasized that *Twombly* was not limited to the antitrust context but applied to all complaints as an interpretation of Rule 8 of the Federal Rules of Civil Procedure.¹²⁰ Indeed, the Court expressly rejected the argument that *Twombly* was limited to antitrust cases.¹²¹ Elaborating on *Twombly*’s language, the *Iqbal* Court set forth two principles governing 12(b)(6) motions to dismiss. First, legal conclusions ought not be assumed true whereas factual allegations must still be presumed true; second, a complaint must state a “plausible claim for relief,” something more than “the mere possibility of misconduct.”¹²² This second step requires judges to “draw on [their] judicial experience and common sense” in performing this “context-specific task.”¹²³

112. *Id.* at 1305.

113. *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009).

114. *Id.* at 666.

115. *Id.*

116. *Id.* at 669.

117. *Id.* at 666.

118. *Id.* at 670 (quoting *Iqbal v. Hasty*, 490 F.3d 143, 157–58 (2d Cir. 2007)).

119. *See id.* at 687.

120. *See id.* at 677–78.

121. *Id.* at 684.

122. *Id.* at 678–79.

123. *Id.* at 679.

The judicial sifting that *Twombly* and *Iqbal* require courts to engage in is meant to respond to the increasing costs of discovery and the danger of extortionate strike suits.¹²⁴ In *Twombly*, a complex antitrust case, financial costs were directly implicated: “something beyond the mere possibility of loss causation must be alleged, lest a plaintiff with a largely groundless claim be allowed to take up the time of a number of other people, with the right to do so representing an in terrore increment of the settlement value.”¹²⁵ The Court continued, “[T]his basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.”¹²⁶ That point of minimum expenditure is the 12(b)(6) motion to dismiss, before discovery begins.¹²⁷ Although concerns with the financial costs of discovery were not so directly at issue in *Iqbal*’s civil rights claim, an analogous concern was present.¹²⁸ Civil rights suits such as *Iqbal*’s threaten to distract the attention of government officials and divert resources from the concerns of governing.¹²⁹ Accordingly, the *Twombly* and *Iqbal* standard is concerned with freeing defendants from the costs of frivolous discovery and thereby reducing the settlement value of otherwise meritless suits. In applying that standard, courts should therefore weigh the risks and costs of discovery against the social utility to be gained.¹³⁰

Whether *Twombly* and *Iqbal* establish a new and heightened pleading standard or merely refine the method by which courts evaluate complaints on a 12(b)(6) motion continues to be debated,¹³¹

124. See generally Brian T. Fitzpatrick, *Twombly and Iqbal Reconsidered*, 87 NOTRE DAME L. REV. 1621, 1630 (arguing that the Supreme Court’s decision in *Twombly* and *Iqbal* “to recalibrate plaintiffs’ discovery rights” is justified in light of the costs of e-discovery and reflects a preexisting practice among district courts responding to those costs, while also noting that there may be better means to control discovery costs).

125. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557–58 (2007) (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)) (internal quotation marks removed).

126. *Id.* at 558 (quoting 5 CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE & PROCEDURE § 1216, at 233–34 (3d ed. 2004)).

127. Fitzpatrick, *supra* note 124, at 1627 (“Summary judgment was too late to weed out meritorious claims, the Court said, because discovery had become far too costly and burdensome to force defendants to endure it without at least some assurance that the endeavor had some merit to it.” (citing *Twombly*, 550 U.S. at 557–59)).

128. See *Iqbal*, 556 U.S. at 685 (following *Twombly* in rejecting the “careful-case-management” approach to cabining discovery).

129. See *id.* at 685 (“Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government.”).

130. See Fitzpatrick, *supra* note 124, at 1627–28.

131. See Michael Eaton, *The Key to the Courthouse Door: The Effect of Ashcroft v. Iqbal and the Heightened Pleading Standard*, 51 SANTA CLARA L. REV. 299, 315–25 (2011)

but after *Iqbal*, it is certain that 12(b)(6) motions cannot be disposed of without reference to and application of the Rule 8 standard as set forth in those cases. As we will see, this is particularly true in the context of § 1681c(g) claims, where *Iqbal* has had a substantial effect on the granting of motions to dismiss.¹³²

Having surveyed the background law necessary to understand the FACTA case law, we now turn to a brief examination of the pre-*Iqbal* § 1681c(g) litigation. Thereafter our attention will turn to the post-*Iqbal* case law and the competing interpretations of *Safeco* in those cases.

II. PRE-*IQBAL* FACTA RECEIPT REQUIREMENT LITIGATION

Prior to *Twombly* and *Iqbal*, defendants rarely obtained dismissal of FACTA receipt complaints on 12(b)(6) motions to dismiss.¹³³ Excluding complaints based on internet receipts, claims foreclosed by the Clarification Act, and those where *Safeco* applies,¹³⁴ prior to *Iqbal* only two district courts had dismissed complaints for factual insufficiency of the pleadings—more specifically, failure to plausibly allege a willful violation.¹³⁵ Unsurprisingly, both courts cited to and applied *Twombly*.¹³⁶ But those were rare exceptions, and their

(contrasting these competing views of the “*Twiqbal*” standard); see also Jonah B. Gelbach, Note, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270, 2277–78 (2012) (finding, in an empirical study, that the *Twiqbal* standard has not only had effects on grant rates of 12(b)(6) motions, but has also had effects in terms of what suits are brought by plaintiffs). There is a rich empirical literature on the impact of *Twombly* and *Iqbal* on the federal courts. See generally, e.g., Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117 (2015) (surveying the previous literature and offering a new empirical study showing that the existing literature tends to underestimate the impact of the new pleading standards); David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203 (2013) (examining the empirical research that has arisen post-*Iqbal*).

132. See *infra* Part III; see also Appendix B.

133. See *infra* Appendix A.

134. These are all cases of legal rather than factual insufficiency. It is worth recalling here that this Comment focuses exclusively on cases challenging the plausibility of plaintiffs’ allegations of a willful violation.

135. *Rosenthal v. Longchamp Coral Gables, LLC (Rosenthal I)*, 603 F. Supp. 2d 1359, 1361–62 (S.D. Fla. 2009) (granting dismissal with leave to amend); *Howard v. Hooters*, No. H-07-3399, 2008 U.S. Dist. LEXIS 30776, at *4 (S.D. Tex. Apr. 5, 2008) (Hughes, J.) (denying class certification and granting dismissal without leave to amend).

136. *Rosenthal I*, 603 F. Supp. 2d at 1361 (“The Court will analyze Plaintiff’s allegations under *Safeco*] . . . and *Twombly*.”); *Howard*, 2008 U.S. Dist. LEXIS 30776, at *3 (citing *Twombly* for the proposition that “mere assertions and a formulaic recitation of the statute are insufficient”).

persuasive force is limited.¹³⁷ Nonetheless, they anticipate the line of argument that would later become more successful following *Iqbal*—that the plaintiff has failed to make adequate factual allegations to plausibly claim a willful violation of FACTA.¹³⁸

Excluding the outliers mentioned above, most pre-*Iqbal* complaints survived 12(b)(6) motions by providing only generalized allegations about the length of time since FACTA's passage, the attendant publicity, the compliance of other businesses, and the practice of credit card companies of informing merchants of FACTA's requirements.¹³⁹ Of the twenty-one written decisions in which defendants argued that the plaintiffs had failed to adequately allege a willful violation, twenty resulted in denials of defendants' 12(b)(6) motions.¹⁴⁰ Even counting only cases decided after *Twombly*, fifteen resulted in denials of motions to dismiss as compared to two grants of 12(b)(6) motions.¹⁴¹ Such cases, when they do apply *Twombly*, rarely explain why such generalized facts—facts consistent with either a negligent or a willful violation—are sufficient to make the claim of liability not merely possible but plausible.¹⁴² The implicit assumption seems to be that given the publicity attendant to FACTA's passage, the information about FACTA provided by credit card companies, and the length of time since FACTA's passage, any

137. Not only can the decision in *Howard v. Hooters* be described as idiosyncratic, but it also fails to make clear what allegations were made in the complaint such that they were inadequate. 2008 U.S. Dist. LEXIS 30776, at *1–4; see also *In re TJX Cos., Fair & Accurate Credit Transactions Act Litig.*, No. 07-md-1853-KHV, 2008 WL 2020375, at *3 (D. Kan. May 9, 2008) (“[T]he court dismissed plaintiff’s FACTA claim for insufficient allegations of willfulness without actually summarizing the complaint.” (citing *Howard*, 2008 U.S. Dist. LEXIS 30776)). *Rosenthal I* depends on an argument that is no longer available today. Specifically, the argument seems to be that because the violation in question occurred shortly after the expiration of the Clarification Act’s safe-harbor period, something more than a bare allegation of a noncompliant receipt (containing the expiration date only) was needed to plausibly suggest that defendant’s noncompliance was at least reckless rather than negligent. *Rosenthal I*, 603 F. Supp. 2d at 1361–62.

138. See *infra* Section III.A; see also Appendix B.

139. See *infra* Appendix A; see, e.g., *Kubas v. Standard Parking Corp.* Ill., 594 F. Supp. 2d 1029, 1031–32 (N.D. Ill. 2009) (describing plaintiff’s allegations regarding the enactment of FACTA and its grace period, the practices of card issuers, and other businesses’ compliance).

140. See *infra* Appendix A.

141. *Id.* *Twombly* was decided on May 21, 2007. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 544 (2007).

142. See, e.g., *In re TJX Cos.*, 2008 WL 2020375, at *2; *Iosello v. Leiblys, Inc.*, 502 F. Supp. 2d 782, 785 (N.D. Ill. 2007) (asserting that the plaintiff’s allegations of general facts applicable to any § 1681c(g) defendant plausibly suggest willfulness but failing to say why such facts, consistent with either willfulness or negligence, make willfulness plausible); *Ehrheart v. Lifetime Brands, Inc.*, 498 F. Supp. 2d 753, 756 (E.D. Pa. 2007) (stating the same).

violation of § 1681c(g) is sufficient to make out a plausible claim for a willful violation.

An example of this tendency can be found in *In re TJX Cos., Fair & Accurate Credit Transactions Act Litigation*,¹⁴³ where the plaintiff alleged the inclusion of an expiration date on a receipt.¹⁴⁴ The court, on its way to rejecting the defendant's motion to dismiss, first dutifully noted *Twombly* and the new plausibility standard requiring "minimal factual allegations" on each element in order to state a plausible claim.¹⁴⁵ Next, rather than engaging in an analysis of the complaint after disregarding conclusory allegations, the court recited the plaintiffs' allegations that "defendants recognized their statutory duty to limit the information which appeared on customer receipts, but intentionally ignored that duty and refused to take steps to comply with FACTA."¹⁴⁶ But those appear to be conclusory allegations lacking underlying facts, just like the allegations of conspiracy in *Twombly*.¹⁴⁷ Despite the conclusory nature of these allegations, the court concluded that "[w]hen taken as true, [they] state a plausible claim for willful violations of FACTA."¹⁴⁸ Thus, the court failed to follow *Twombly* by undertaking the plausibility analysis after first disregarding conclusory allegations.¹⁴⁹

In support of its conclusion, the court produced a string cite of cases purporting to show both that the plaintiffs' allegations were "typical" and that courts have "uniformly rejected the argument that such allegations do not sufficiently allege willful violations of the statute."¹⁵⁰ But the four cases cited suffered from the same defect as *In re TJX* itself—they failed to analyze how generalized allegations that are consistent with negligent, reckless, or knowing violations make a reckless or knowing violation plausible rather than merely possible.¹⁵¹ This defect is common in the pre-*Iqbal* case law, and it is

143. No. 07-md-1853-KHV, 2008 WL 2020375 (D. Kan. May 9, 2008).

144. *Id.* at *1.

145. *Id.* at *2.

146. *Id.*

147. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 564 (2007).

148. *In re TJX*, 2008 WL 2020375, at *2.

149. This is somewhat understandable given that *Twombly* did not articulate the two required steps as *Iqbal* would later do. Disregarding conclusory allegations of conspiracy was instead what the *Twombly* Court *did* before holding that allegations of parallel behavior did not nudge a claim under § 1 of the Sherman Act from possible to plausible. See *Twombly*, 550 U.S. at 556–57, 564.

150. *In re TJX*, 2008 WL 2020375, at *2.

151. See *Ramirez v. MGM Mirage, Inc.*, 524 F. Supp. 2d 1226, 1233 (D. Nev. 2007); *Follman v. Hosp. Plus of Carpentersville, Inc.*, 532 F. Supp. 2d 960, 962–63 (N.D. Ill. 2007);

only after *Iqbal* that courts begin to apply greater scrutiny to § 1681c(g) claims.¹⁵²

III. POST-*IQBAL* LITIGATION

Despite *Iqbal*'s clarification of pleading standards, its application to § 1681c(g) claims has been uneven. Two cases that followed *Iqbal* by a matter of months and denied motions to dismiss failed to even cite *Iqbal*, much less apply it.¹⁵³ At least one case concluded, without any plausibility analysis, that because *Safeco* did not expressly require willfulness to be pleaded, a conclusory allegation of willfulness was sufficient.¹⁵⁴ Similarly, another case largely avoided the issue by asserting that the question of willfulness is more appropriate for summary judgment.¹⁵⁵ More common, however, are cases that cite *Iqbal* while depending on pre-*Iqbal* cases that deny motions to dismiss § 1681c(g) claims—as though pre-*Iqbal* case law continues to have the same persuasive force in a post-*Iqbal* world.¹⁵⁶ Less frequently, as discussed in the next paragraph, a court rigorously applies *Iqbal* yet denies a motion to dismiss.¹⁵⁷

Iosello v. Leiblys, Inc., 502 F. Supp. 2d 782, 784–85 (N.D. Ill. 2007); *Ehrheart v. Lifetime Brands, Inc.*, 498 F. Supp. 2d 753, 756 (E.D. Pa. 2007).

152. See *infra* Section III.A; see also Appendix B.

153. *Steinberg v. Stitch & Craft, Inc.*, No. 09-60660-CIV, 2009 WL 2589142, at *2 (S.D. Fla. Aug. 18, 2009); *Rosenthal v. Longchamp Coral Gables, LLC (Rosenthal II)*, No. 08–21757–CIV, 2009 WL 1854846, at *2 (S.D. Fla. June 29, 2009). It is worth noting that although this latter motion to dismiss had been briefed prior to *Iqbal*, defense counsel filed a notice of supplemental authority on *Iqbal* two days after that case was decided, and over a month before the court decided *Rosenthal II*. See Defendant's Notice of Supplemental Authority In Support of its Motion to Dismiss the Second Amended Complaint at 1–4, *Rosenthal v. Longchamp Coral Gables, LLC (S.D. Fla. 2009)* (No. 08-21757-CIV-MORENO/TORRES), 2009 WL 1854846.

154. *Desousa v. Anupam Enters., Inc.*, No. 2:09-CV-504-FtM-29DNF, 2010 WL 2026114, at *3 (M.D. Fla. May 20, 2010) (“[*Safeco*] did not, however, provide that reckless disregard was an additional allegation that must be pled.”).

155. *Korman v. Walking Co.*, 503 F. Supp. 2d 755, 761 (E.D. Pa. 2007).

156. See, e.g., *Lavery v. RadioShack Corp.*, No. 13-CV-05818, 2014 WL 2819037, at *2 (N.D. Ill. June 23, 2014) (“In this District, such allegations have repeatedly been held sufficient to survive the pleading stage.” (citing *Kubas v. Standard Parking Corp.* Ill., 594 F. Supp. 2d 1029, 1031–32 (N.D. Ill. 2009))); *Troy v. Home Run Inn, Inc.*, No. 07 C 4331, 2008 WL 1766526, at *2 (N.D. Ill. Apr. 14, 2008); *Dudzienski v. Gordon Food Serv., Inc.*, No. 07 C 4033, 2008 WL 4372720, at *1 (N.D. Ill. Mar. 19, 2008); *Follman*, 532 F. Supp. 2d at 963; *Harris v. Wal-Mart Stores, Inc.*, No. 07 CV 2561, 2007 WL 3046162, at *2 (N.D. Ill. Oct. 10, 2007); *Iosello*, 502 F. Supp. 2d at 785.

157. See, e.g., *Zaun v. Tuttle, Inc.*, No. 10-2191 (DWF/JJK), 2011 WL 1741912, at *1–2 (D. Minn. May 4, 2011) (applying *Iqbal* and denying defendant's motion to dismiss); see also *Fullwood v. Wolfgang's Steakhouse, Inc. (Fullwood II)*, No. 13 Civ. 7174(KPF), 2015 WL 4486311, at *4 (S.D.N.Y. July 23, 2015) (holding that, while partial compliance alone makes recklessness implausible, when combined with the reasonable inference that the

In *Zaun v. Tuttle, Inc.*,¹⁵⁸ the plaintiff alleged more than the mere existence of publicity surrounding FACTA and the Clarification Act—an allegation applicable to any § 1681c(g) defendant.¹⁵⁹ The plaintiff further alleged that the defendant had hired a third-party point-of-sale systems provider that had warned the defendant that upgrades to the point-of-sale system were necessary to comply with FACTA.¹⁶⁰ Instead of making the necessary upgrades, the defendant allegedly “ignored the[] warnings,” then cancelled its contract with the point-of-sale provider.¹⁶¹ The court concluded that these allegations in particular were sufficient to allege a willful violation of FACTA.¹⁶² In this case, the court reasoned, the defendant not only clearly knew of its duty under FACTA, but also knew what actions it should take to bring its receipts into compliance with FACTA and still chose not to take those actions in order to save money.¹⁶³ Accordingly, *Zaun* provides an example of the kind of allegations that a plaintiff must be prepared to make in order to overcome the more demanding standards established by *Twombly* and *Iqbal*. Specifically, plaintiffs would have to plead facts analogous to the damning allegation that the *Zaun* defendant was warned that it was violating § 1681c(g), but chose to continue to violate FACTA to save money rather than comply with the law. And *Zaun* is not alone in rigorously applying *Iqbal* to § 1681c(g) claims.

A. *The Emerging Trend of Grants of 12(b)(6) Motions to Dismiss on the Basis of Failure to Adequately Plead a Willful Violation*

Since *Iqbal*, district courts have shown an increasing willingness to dismiss § 1681c(g) claims where only an expiration date has been included on the receipt.¹⁶⁴ Excluding cases dealing with online receipts, merchant copies, and the inclusion of the credit card number on the receipt, as well as motions to dismiss third-party complaints and cases that otherwise do not address the plausibility of the allegations of willfulness or where *Safeco* applies, there are a total of eighteen written decisions granting or denying 12(b)(6) motions to

defendant had specifically negotiated an exception in its liability insurance coverage for FACTA violations, the plaintiff had adequately alleged willfulness).

158. No. 10-2191 (DWF/JJK), 2011 WL 1741912 (D. Minn. May 4, 2011).

159. *Id.* at *2.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. Compare Appendix B, with Appendix A.

dismiss.¹⁶⁵ Of these eighteen decisions, eight grant the defendant's motion to dismiss, and two of the remaining ten grant the motion with prejudice. Further, as noted above, two of the ten cases denying motions to dismiss were decided shortly after *Iqbal* and fail to cite or apply *Iqbal*.¹⁶⁶ Whether or not these two cases are counted, the post-*Iqbal* § 1681c(g) cases demonstrate a stark departure from the pre-*Iqbal* decisions, of which only two granted a motion to dismiss.¹⁶⁷ Additionally, the Southern District of New York recently dismissed a complaint with prejudice when the merchant failed to properly truncate the credit card number¹⁶⁸—an unprecedented result suggesting that the trend of granting motions to dismiss continues to gather strength given that cases where too many credit card numbers are printed are rarely dismissed.¹⁶⁹ Although the overall impact of *Twombly* and *Iqbal* may be debated, it is safe to say that for § 1681c(g) cases, *Iqbal* has been a game changer.¹⁷⁰

In June 2014, Judge Jed Rakoff of the Southern District of New York authored perhaps the most comprehensive decision dismissing a § 1681c(g) complaint,¹⁷¹ which was later followed by a published

165. My methodology in finding cases via Westlaw was to first use “1681c(g)” to pull the appropriate FACTA receipt requirement cases, then use either “12(b)(6)” or “motion to dismiss” to further winnow the results. At that point, I sorted the cases by date and read each case going back to the date of the *Iqbal* decision on May 18, 2009. I later returned to the results from the “1681c(g)” query without using the “12(b)(6)” or “motion to dismiss” filters to ensure that I had not missed any cases disposing of relevant motions to dismiss. See *infra* Appendix B for a table of relevant cases. One case, *Fullwood v. Wolfgang's Steakhouse, Inc.*, denied the defendant's motion to dismiss without prejudice, dismissing the plaintiff's first amended complaint but granting the plaintiff leave to file a proposed second amended complaint, while also permitting the defendant to refile the motion to dismiss in response to the proposed complaint. (*Fullwood I*), No. 13 Civ. 7174(KPF), 2014 WL 6076733, at *1, *6–8 (S.D.N.Y. Nov. 14, 2014). This Comment will treat the *Fullwood I* case as though the motion to dismiss had been granted with leave to amend.

166. *Supra* note 94 and accompanying text.

167. See *supra* note 135 and accompanying text.

168. *Katz v. Donna Karan Int'l, Inc.*, No. 14 Civ. 740(PAC), 2015 WL 405506, at *1–2 (S.D.N.Y. Jan. 30, 2015) (“[C]ontrary to Plaintiff's argument, a pleading which demonstrates negligence does not ‘raise[] a triable issue as to recklessness.’ Plaintiff's attempt at alleging recklessness—a higher standard, triggering statutory damages—cannot be achieved by merely alleging negligence—a lower standard, triggering actual damages. Such a conflation not only erodes the difference between negligence and recklessness, but it also renders the pleading standards imposed by Rule 12(b)(6) meaningless; in practice, it would essentially permit all plaintiffs alleging willful FACTA violations to bypass Rule 12(b)(6) and proceed to discovery/summary judgment.” (citations omitted)).

169. See *supra* notes 24–26 and accompanying text (discussing how cases involving violations of the credit card requirement are treated differently by courts).

170. Compare Appendix A, with Appendix B.

171. *Crupar-Weinmann v. Paris Baguette Am., Inc. (Paris Baguette I)*, No. 13 Civ. 7013(JSR), 2014 WL 2990110, at *5 (S.D.N.Y. June 30, 2014), *appeal docketed*, No. 14-3709 (2d Cir. Oct. 2, 2014). Oral argument was heard on October 28, 2015, but at the time

decision denying the plaintiff's motion for reconsideration.¹⁷² In *Crupar-Weinmann v. Paris Baguette, America, Inc.*,¹⁷³ the plaintiff alleged that almost all other businesses complied with § 1681c(g), that various credit card companies had informed the defendant of FACTA's requirements, that there was wide publicity of those requirements, and that credit card companies required removal of expiration dates.¹⁷⁴ These allegations are essentially no different than those made by most plaintiffs in § 1681c(g) cases, with the exception of *Zaun's* highly specific allegations.¹⁷⁵ In his order dismissing the case, Judge Rakoff noted that the plaintiff implicitly argued that "a knowing violation can be inferred solely from the fact that a defendant knew of the relevant statute and then violated it."¹⁷⁶ But the plaintiff's position—shared by the case law rejecting motions to dismiss—misunderstands *Safeco* and fails to place that decision in the broader context of civil willfulness jurisprudence, a task Judge Rakoff takes up in his decision.

Judge Rakoff observed that, while *Safeco* deals primarily with the recklessness prong of willfulness under FACTA, it relies on earlier Supreme Court cases interpreting willfulness in the civil context.¹⁷⁷ In one of those cases, *Trans World Airlines, Inc. v. Thurston*,¹⁷⁸ the Court stated that to make out a knowing violation, it is not enough to show that the defendant knew of a legal obligation; instead, the essence of a knowing violation is to know that one's conduct violates that legal obligation.¹⁷⁹ Accordingly, Judge Rakoff held that to survive a motion to dismiss, the "[c]omplaint must plead sufficient facts to support a plausible inference that defendant knew that its conduct was violating the statute, and not simply that the defendant knew about the existence of the statutory provision at issue."¹⁸⁰ *Paris Baguette I* therefore interprets *Safeco* as establishing

of this Comment's publication, no opinion had issued from the Second Circuit. *Crupar-Weinmann v. Paris Baguette Am., Inc.*, No. 14-3709 (2d Cir. Oct 28, 2015) (No. 56).

172. *Crupar-Weinmann v. Paris Baguette Am., Inc. (Paris Baguette II)*, 41 F. Supp. 3d 411, 413 (S.D.N.Y. 2014), *appeal docketed*, No. 14-3709 (2d Cir. Oct. 2, 2014).

173. *Paris Baguette I*, 2014 WL 2990110.

174. *Id.* at *2–3.

175. *Zaun v. Tuttle, Inc.*, No. 10-2191 (DWF/JJK), 2011 WL 1741912, at *2 (D. Minn. May 4, 2011).

176. *Paris Baguette I*, 2014 WL 2990110, at *3.

177. *Id.* at *3–4.

178. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985).

179. *Id.* at 127–29.

180. *Paris Baguette I*, 2014 WL 2990110, at *4. In doing so, Judge Rakoff expressly followed the approach of the District of Maine in *Viodni v. Acadia Corp.*, 11-CV-00448-NT, 2012 WL 1565128 (D. Me. Apr. 27, 2012) (granting a defendant's motion to dismiss

that knowledge of FACTA does not alone make a knowing or reckless violation—whereas the alternative interpretation of *Safeco* forecloses the possibility of dismissal on a 12(b)(6) motion and essentially eliminates the requirement of a showing of willfulness because of the clarity of § 1681c(g).¹⁸¹

Judge Rakoff continued by applying *Iqbal*, noting which allegations would be disregarded as conclusory before addressing whether the remaining allegations were sufficient to plausibly infer a reckless or knowing violation.¹⁸² First, he observed that the allegations of widespread publicity and other businesses' compliance were applicable to all FACTA defendants and therefore established nothing with respect to Paris Baguette.¹⁸³ Next, weighing the remaining allegations, the court concluded that the plaintiffs at most showed that Paris Baguette knew of FACTA and its requirements and acted negligently.¹⁸⁴ Critically, from the fact that Paris Baguette had complied with the truncation requirement while failing to remove expiration dates, the court inferred that it was actually implausible to think that the defendant was more than negligent in its failure to remove the expiration date—the effort to remove the credit card numbers, the court reasoned, showed that there was some attempt to comply.¹⁸⁵ This inference is crucial, as much of the earlier case law had refused to draw any such inference from the fact of partial compliance, instead focusing on the clarity of the statute and the corresponding lack of any defense under *Safeco*.¹⁸⁶

By rigorously applying *Iqbal*, Judge Rakoff arrived at the question that earlier cases denying motions to dismiss failed to address: how can general allegations of knowledge of the statute and

and following *Trans World Airlines* in holding that mere knowledge of a statute is not sufficient for a knowing violation).

181. See *Paris Baguette I*, 2014 WL 2990110, at *4. Section 1681c(g) reads: “[N]o person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction.” 15 U.S.C. § 1681c(g) (2012). Whatever ambiguity there may be in the statute’s plain text, the Clarification Act makes plain that printing the expiration date alone is sufficient to violate the statute. See Credit and Debit Card Receipt Clarification Act (Clarification Act) of 2007, Pub. L. No. 110-241, § 3(a), 122 Stat. 1565 (2008).

182. *Paris Baguette I*, 2014 WL 2990110, at *4.

183. *Id.* (citing *Komorowski v. All-Am. Indoor Sports, Inc.*, No. 13-2177-SAC, 2013 WL 4766800, at *3–4 (D. Kan. Sept. 4, 2013); *Miller-Huggins v. SpaClinic, LLC*, No. 09 C 2677, 2010 WL 963924, at *2 (N.D. Ill. Mar. 11, 2010)).

184. *Id.*

185. *Id.*

186. *E.g.*, *Korman v. Walking Co.*, 503 F. Supp. 2d 755, 762 (E.D. Pa. 2007) (“In short, the statutory text here is not, as was the case in *Safeco*, ‘less than pellucid.’”).

its requirements make a willful violation plausible when such knowledge is consistent with either a negligent or willful violation of § 1681c(g)? In this case, he concluded that the plaintiff had offered no further facts that would explain or even suggest why or how a defendant who had made some effort to comply with FACTA would knowingly or recklessly disregard the expiration date requirement as opposed to having merely been negligent in complying.¹⁸⁷ The court reiterated this in its denial of the plaintiff's motion for reconsideration: "[P]laintiff has pleaded no facts that make it plausible that defendant was anything other than 'merely careless' . . . the allegations . . . show, at best, that defendant knew of the statute and acted carelessly in not complying with it."¹⁸⁸

Paris Baguette I and *II* and the other post-*Iqbal* cases granting motions to dismiss depend on an interpretation of *Safeco* that is sharply at odds with that espoused by other courts. Because *Safeco* sets out the Supreme Court's understanding of willfulness in the context of FACTA, the interpretation of that case can be determinative of whether or not willfulness has been adequately pleaded. Accordingly, Part IV examines how *Safeco* ought to be interpreted.

IV. INTERPRETING *SAFECO*

For the purposes of § 1681c(g) litigation, *Safeco* presents two fundamental questions of interpretation for courts. First, should *Safeco* be interpreted as adding to preexisting jurisprudence on the meaning of willfulness in the civil context, or does it constitute the exclusive measure of willfulness in the context of FACTA? Second, does *Safeco*'s not-objectively-unreasonable-reading standard provide an affirmative defense, or can that standard be used to foreclose the grant of a motion to dismiss? If *Safeco* is interpreted as the exclusive measure of willfulness in the civil context such that it forecloses the grant of a motion to dismiss because of § 1681c(g)'s clarity, then every violation of § 1681c(g) becomes a willful violation. Such an interpretation effectively reads out of the statute the possibility of negligent violations of § 1681c(g).

Courts have split on these two questions. Courts granting motions to dismiss—like the Southern District of New York in *Paris Baguette I* and *II*—tend to interpret *Safeco* with the aid of earlier

187. *Paris Baguette I*, 2014 WL 2990110, at *4.

188. *Paris Baguette II*, 41 F. Supp. 3d 411, 413 (S.D.N.Y. 2014), *appeal docketed*, No. 14-3709 (2d Cir. Oct. 2, 2014).

cases like *Trans World Airlines* and do not use *Safeco* to foreclose grants of motions to dismiss.¹⁸⁹ Cases denying motions to dismiss take the opposite tack.¹⁹⁰

As with many of the issues arising in § 1681c(g) litigation, there are few appellate decisions interpreting *Safeco* in this context and none directly on point.¹⁹¹ The appellate case that most nearly addresses the proper interpretation of *Safeco* is *Fuges v. Southwest Financial Services, Ltd.*¹⁹² In *Fuges*, the defendant, a provider of property reports containing credit information such as liens, was sued for failure to prepare its property reports in compliance with the FCRA, as amended by FACTA.¹⁹³ The defendant moved to dismiss, arguing that the FCRA did not apply to it, or, if it did, that there was no willful violation because its interpretation of the statute was not objectively unreasonable.¹⁹⁴ The district court agreed and granted summary judgment, reasoning that whether or not the FCRA applied, under the *Safeco* standard no reasonable jury could find that the defendant had willfully violated the statute.¹⁹⁵ On appeal, the plaintiff argued that, prior to the litigation, the defendant had never actually interpreted the statute at all, and so should not be entitled to the “*Safeco* reasonable interpretation defense.”¹⁹⁶ The Third Circuit rejected this argument, affirming the district court’s grant of summary judgment.¹⁹⁷

189. See, e.g., *Paris Baguette I*, 2014 WL 2990110, at *3–4 (interpreting *Safeco* with the aid of *Trans World Airlines*); see also *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 127–29 (1985) (holding that to establish a knowing violation requires showing that the defendant knew her conduct violated a known legal obligation).

190. See, e.g., *Buechler v. Keyco, Inc.*, No. WDQ-09-2948, 2010 WL 1664226, at *2 (“Buechler has sufficiently alleged willfulness. Unlike the provision of FCRA at issue in *Safeco*, the FACTA provision Keyco allegedly violated is unambiguous.”).

191. For example, *Schlahtichman v. 1-800 Contacts, Inc.* is a straightforward application of *Safeco* to a case dealing with an email receipt. 615 F.3d 794, 798–804 (7th Cir. 2010) (affirming the district court’s grant of the defendant’s motion to dismiss, holding that internet receipts are not printed and so fall outside of § 1681c(g)). Similarly, *Redman v. RadioShack Corp.*, in the portion of the decision devoted to the companion case *Nicaj v. Shoe Carnival*, affirming the district court’s grant of dismissal with prejudice, held that omitting only the year of the expiration date constituted “a permissible interpretation of an ambiguous statute.” 768 F.3d 622, 639–40 (7th Cir. 2014). And the Third Circuit, in *Long v. Tommy Hilfiger U.S.A.*, held that omitting the year, while based on an erroneous interpretation of FACTA, was not a willful violation because such omission was based on a not objectively unreasonable interpretation. 671 F.3d 371, 377–78 (3d Cir. 2012) (affirming a district court’s grant of a motion to dismiss).

192. *Fuges v. Sw. Fin. Servs., Ltd.*, 707 F.3d 241 (3d Cir. 2012).

193. *Id.* at 245.

194. *Id.*

195. *Id.* at 243.

196. *Id.* at 249 (internal quotation marks removed).

197. *Id.* at 249–51, 255.

In reaching its decision, the Third Circuit repeatedly characterized *Safeco* as a “test” or “defense” rather than as an elaboration on what constitutes reckless behavior.¹⁹⁸ It did so because *Safeco* made clear that, for purposes of the test established, intent and other subjective states of mind are irrelevant.¹⁹⁹ In other words, *Safeco* creates a defense that requires an objective analysis under which the defendant’s subjective state of mind does not matter. A reasonable interpretation of the statute is not dispositive evidence of an actual, subjective lack of willfulness (i.e., recklessness or knowingly engaging in conduct violating the statute). Instead, a defendant who shows an objectively reasonable interpretation of the statute bypasses entirely the question of subjective willfulness and defeats the plaintiff’s claim of a willful violation by an affirmative defense. This is in keeping with the traditional understanding of an affirmative defense, which defeats the plaintiff’s claim even if she has made out a prima facie case by establishing the elements of the claim.²⁰⁰ Accordingly, *Safeco* does not so much define “willfulness”—and so affect the struggle to establish that element of a claim for statutory damages—but rather provides an affirmative defense against a prima facie claim of a willful violation. This reading of *Safeco* interprets the decision within the Court’s broader jurisprudence on willfulness in the civil context while being highly congenial to § 1681c(g) defendants because even where no *Safeco* defense is available, the plaintiff must still adequately plead willfulness and eventually carry the burden of persuasion on that element—the very piece of the analysis that so many courts neglect in applying *Safeco*.²⁰¹

198. *Id. passim*.

199. *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 70 n.20 (2007) (“To the extent that [plaintiffs] argue that evidence of subjective bad faith can support a willfulness finding even when the company’s reading of the statute is objectively reasonable, their argument is unsound.”).

200. 5 CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE & PROCEDURE § 1270 (3d ed. 2004) (observing that the Federal Rules of Civil Procedure’s recognition of affirmative defenses is a “lineal descendant of the common law plea by way of ‘confession and avoidance,’ which permitted a defendant who was willing to admit that the plaintiff’s declaration demonstrated a prima facie case to then go on and allege additional new material that would defeat the plaintiff’s otherwise valid cause of action”). In federal courts today, “[a]n affirmative defense will defeat the plaintiff’s claim if it is accepted by the district court or the jury.” *Id.* Whereas in the absence of an affirmative defense a defendant must prevail by preventing the plaintiff from meeting her burden of persuasion as to the elements of the claim, by asserting an affirmative defense the defendant provides himself an avenue to victory by meeting his own burden of persuasion on the elements of the defense.

201. *See supra* Parts II–III.

A recent Southern District of New York case similarly concludes that the unavailability of a *Safeco* defense does not determine whether a plaintiff has adequately alleged a willful violation of FACTA. In *Fullwood v. Wolfgang's Steakhouse, Inc.*,²⁰² a § 1681c(g) case, the court denied the defendant's motion to dismiss but made clear that the plaintiff could file a proposed amended complaint to which the defendant would have the opportunity to offer a new motion to dismiss.²⁰³ The court explained that while the plaintiff's first amended complaint—which had been the basis of the briefing for the motion to dismiss—fell short of adequately pleading willfulness, a new proposed complaint might not be so deficient and deserved briefing in its own right.²⁰⁴

To reach this conclusion, the court engaged in an extended discussion of *Safeco* and what was necessary to adequately plead willfulness in a § 1681c(g) case.²⁰⁵ First, the court pithily summarized the interpretive difficulty presented by *Safeco*: “[I]t is unclear how to apply the *Safeco* Court's standards for a knowing or reckless violation of the FCRA when the proper interpretation of the particular statutory provision is not in doubt.”²⁰⁶ The court then characterized this question of interpretation as presenting two possible answers—either *Safeco* forecloses any inquiry into a defendant's subjective willfulness because of the clarity of § 1681c(g), or a plaintiff must plead and eventually prove a subjectively knowing or reckless violation even in the absence of a not-objectively-unreasonable reading of the statute. Continuing, the court observed, “If there is only one reasonable reading of the statute, does a willful violation flow automatically once knowledge of the statute's requirements is demonstrated? Or must there be awareness that the defendant's behavior violates or recklessly runs the risk of violating those requirements?”²⁰⁷

202. *Fullwood v. Wolfgang's Steakhouse, Inc. (Fullwood I)*, No. 13 Civ. 7174(KPF), 2014 WL 6076733 (S.D.N.Y. Nov. 14, 2014).

203. *Fullwood I*, 2014 WL 6076733, at *1 (“Defendants’ motion to dismiss is denied without prejudice to refile in light of Plaintiff’s proposed amendment to her complaint . . .”). Despite the court’s characterization, this result is the functional equivalent of a grant without prejudice of defendant’s motion to dismiss, insofar as the plaintiff will file an amended complaint to which the defendant will have the opportunity to respond with a second 12(b)(6) motion.

204. *Id.* at *7–8.

205. *See id.* at *4.

206. *Id.* at *4.

207. *Id.*

The court then established that both district and appellate courts have interpreted *Safeco* in light of other federal civil statutes.²⁰⁸ At least two district courts, including the Southern District of New York in *Paris Baguette I* and *II*, had taken the approach of requiring subjective recklessness, interpreting *Safeco* in the context of earlier cases like *Trans World Airlines*.²⁰⁹ Further, appellate courts have used *Safeco* to interpret the meaning of willfulness in other federal statutes.²¹⁰ Finding this approach persuasive, the court in *Fullwood* concluded that knowledge alone is not enough to make out a willful violation; instead, knowledge of FACTA and its requirements must be coupled with “intentionally, knowingly, or recklessly violat[ing] those requirements.”²¹¹

Though lacking an authoritative Supreme Court or appellate decision on point, this interpretation of *Safeco* as providing an additional defense to be used alongside, rather than in place of, subjective willfulness has much to recommend it. First, abundant persuasive authority supports this interpretation.²¹² As the *Fuges* court points out,²¹³ the Supreme Court’s own dicta in *Safeco* implies that, where there is no objectively reasonable reading of the statute supporting the defendant’s conduct, subjective intent still matters because the plaintiff must still carry the burden of persuasion on the willfulness element to recover statutory damages.²¹⁴ *Safeco* then stands only for the proposition that where there is an objectively reasonable reading, the defendant’s subjective state of mind is irrelevant.²¹⁵ Further, the *Safeco* Court itself emphasized that it was

208. *See id.* at *4–5.

209. *Id.* (citing *Crupar-Weinmann v. Paris Baguette, Am., Inc. (Paris Baguette I)*, No. 13 Civ. 7013(JSR), 2014 WL 2990110, at *3–4 (S.D.N.Y. June 30, 2014), *appeal docketed*, No. 14-3709 (2d Cir. Oct. 2, 2014); *Vidoni v. Acadia Corp.*, No. 11-cv-00448-NT, 2012 WL 1565128, at *4 (D. Me. Apr. 27, 2012)).

210. *Id.* at *5 (citing *Fryer v. A.S.A.P. Fire & Safety Corp.*, 658 F.3d 85, 91 (1st Cir. 2011) (using *Safeco* to interpret willfulness under the Age Employment Discrimination Act); *Armalite, Inc., v. Lambert*, 544 F.3d 644, 648 (6th Cir. 2008) (using *Safeco* to interpret willfulness under the Gun Control Act of 1968).

211. *Id.* at *6.

212. *See, e.g.*, *Fuges v. Sw. Fin. Servs., Ltd.*, 707 F.3d 241, 243 (3d Cir. 2012) (characterizing *Safeco* as establishing a defense); *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 69, 70 n.20 (2007) (finding no need to inquire into defendant’s state of mind given the not objectively unreasonable reading of the statute).

213. *Fuges*, 707 F.3d at 248–49.

214. *Safeco*, 551 U.S. at 70 n.20 (“Respondent-plaintiffs argue that evidence of subjective bad faith must be taken into account in determining whether a company acted knowingly or recklessly for purposes of § 1681n(a). To the extent that they argue that evidence of subjective bad faith can support a willfulness finding even when the company’s reading of the statute is objectively reasonable, their argument is unsound.”).

215. *Id.*

not “deviat[ing] from the common law understanding.”²¹⁶ Though no appellate court has ruled directly on point, *Fuges*²¹⁷ and the appellate decisions cited in *Fullwood I*²¹⁸ show that appellate courts have generally interpreted *Safeco* in this vein as well. Persuasive district court opinions granting motions to dismiss in § 1681c(g) cases, such as *Paris Baguette I* and *II*,²¹⁹ further buttress the soundness of this interpretation.

Sound interpretive and policy reasons also counsel this approach to *Safeco*. Unless otherwise indicated, common law terms should be construed according to their common law understanding, and Congress crafts legislation expecting the courts to do just that.²²⁰ Further, this interpretation avoids creating a balkanized Supreme Court jurisprudence on civil willfulness, where different standards apply depending on the statutory context. The alternative—interpreting *Safeco* as the exclusive measure of willfulness in the context of FACTA—would also read out of the statute claims for negligent violations of § 1681c(g) because that provision’s clarity precludes any alternative, objectively reasonable reading. Additionally, lawsuits based on the expiration date alone offer no consumer benefit,²²¹ and, still more unfavorably, litigation costs will be passed on to consumers even in the absence of awards or settlements.²²² By interpreting *Safeco* in line with other decisions on willfulness rather than as foreclosing motions to dismiss for failure to adequately plead willfulness, these costs can be somewhat mitigated by the greater frequency of grants of motions to dismiss and the lower value of settlements obtained without the threat of discovery.

CONCLUSION

Given the high costs and scant benefits of § 1681c(g) lawsuits based only on the printing of expiration dates, this Comment has

216. *Id.* at 69 (“Here, there is no need to pinpoint the negligence/recklessness line, for Safeco’s reading of the statute, albeit erroneous, was not objectively unreasonable.”).

217. *Fuges*, 707 F.3d at 249.

218. *Fullwood v. Wolfgang’s Steakhouse, Inc. (Fullwood I)*, No. 13 Civ. 7174(KPF), 2014 WL 6076733, at *4–5 (S.D.N.Y. Nov. 14, 2014).

219. *Crupar-Weinmann v. Paris Baguette, Am., Inc. (Paris Baguette I)*, No. 13 Civ. 7013(JSR), 2014 WL 2990110, at *3–4 (S.D.N.Y. June 30, 2014), *appeal docketed*, No. 14-3709 (2d Cir. Oct. 2, 2014); *Crupar-Weinmann v. Paris Baguette Am., Inc. (Paris Baguette II)*, 41 F. Supp. 3d 411, 413 (S.D.N.Y. 2014), *appeal docketed*, No. 14-3709 (2d Cir. Oct. 2, 2014).

220. *Safeco*, 551 U.S. at 48 (citing *Beck v. Prupis*, 529 U.S. 494, 500–01 (2000); *Comm’r v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993)).

221. *Supra* notes 20–22 and accompanying text.

222. *Supra* notes 20–28 and accompanying text.

argued that courts ought to take two related measures to curtail the social costs of § 1681c(g) litigation in light of the lack of consumer protection benefit delivered by the expiration date requirement. First, district courts should not hesitate to engage in the “common sense” inquiry required by *Twombly* and *Iqbal*—an inquiry motivated by the costs of discovery and the dangers of in terrorem strike suits.²²³ Second, given that courts cannot decide a motion to dismiss challenging the adequacy of allegations of willfulness without reference to *Safeco*, courts ought to interpret *Safeco* in the context of the Supreme Court’s broader civil willfulness jurisprudence and the term’s common law meaning. By so doing, courts can rein in abusive § 1681c(g) litigation.

While there are good legal and policy reasons for courts to take these steps, they may not be sufficient. The courts cannot write § 1681c(g) out of FACTA and the FRCA. Additionally, plaintiffs’ attorneys are likely to adapt to heightened pleading standards and will find creative ways to adequately plead willfulness.²²⁴ Instead, a legislative solution is necessary. The two simplest and clearest solutions would be either to: (1) remove entirely the expiration date requirement from § 1681c(g); or (2) modify the provision for statutory damages such that none are available where only an expiration date has been printed, maintaining the possibility of statutory damages for willful violations of the truncation requirement. Other possibilities include prohibiting statutory damages for class action suits or placing a ceiling on aggregate statutory damages to limit potential liability.²²⁵

Given the lack of any appreciable consumer benefit from § 1681c(g) litigation based on the printing of an expiration date, proposals to merely cap aggregate statutory damages do not go far enough. Such proposals would merely reduce the costs to be passed on to consumers. But the lack of benefits to be gained by these suits makes any such cost a net loss to consumer welfare. Of the other proposals, removing the possibility of statutory damages might be preferable to removing the expiration date provision altogether. This would leave open the possibility of recovery were some plaintiff to

223. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557–58 (2007).

224. *See, e.g., Fullwood v. Wolfgang’s Steakhouse (Fullwood I)*, No. 13 Civ. 7174(KPF), 2014 WL 6076733, at *7–8 (S.D.N.Y. Nov. 14, 2014) (discussing how much knowledge is needed to permit a plausible inference of a willful violation and how plaintiff’s proposed complaint may meet that standard).

225. *See* Paul Karlsgodt, *Statutory Penalties and Class Actions: Social Justice or Legalized Extortion?*, 90 DENV. U. L. REV. ONLINE 43, 47 (2013).

suffer actual damages through the printing of his card's expiration date.

At the same time, in the absence of decisive judicial or legislative remedies, point-of-sale systems providers and companies with retail operations ought to ensure that the receipts they print are, and remain, FACTA compliant. The testing of new point-of-sale systems and upgrades to older systems should receive special attention. Although the major players in the point-of-sale industry understand what FACTA requires and their products comply with FACTA by default,²²⁶ companies that develop their own point-of-sale systems or depend on less established point-of-sale providers must be especially vigilant. Despite FACTA-compliant defaults, modern point-of-sale systems are highly configurable by persons without technical training,²²⁷ and the possibility remains that personnel unaware of FACTA's requirements could inadvertently alter the configuration of a point-of-sale system to print noncompliant receipts.²²⁸ Merchants should put in place safeguards to prevent such personnel from altering at least those configuration options that are pertinent for FACTA compliance. The potential costs of noncompliance are too great to ignore.

226. Telephone Interview with Jeffrey J. Hawkins, *supra* note 52.

227. *Id.*

228. *Id.*

APPENDIX A. PRE-*IQBAL* § 1681C(G) DECISIONS ON 12(B)(6)
MOTIONS TO DISMISS ARGUING FAILURE TO ADEQUATELY PLEAD
WILLFULNESS AND EXCLUDING ONLINE PURCHASES

Date	Case Name	Disposition	Citation
3/12/07	<i>Clark v. Marshalls of MA, Inc.</i>	Denied	2007 WL 1100412 (C.D. Cal.)
4/03/07	<i>Blanco v. El Pollo Loco, Inc.</i>	Denied [†]	2007 WL 1113997 (C.D. Cal.)
4/03/07	<i>Aeschbacher v. Cal. Pizza Kitchen, Inc.</i>	Denied	2007 WL 1500853 (C.D. Cal.)
4/05/07	<i>Pirian v. In-N-Out Burgers</i>	Denied [†]	2007 WL 1040864 (C.D. Cal.)
5/04/07	<i>Arcilla v. Adidas Promotional Retail Operations, Inc.</i>	Denied	488 F. Supp. 2d 965 (C.D. Cal.)
5/22/07	<i>Soualian v. Int'l Coffee and Tea LLC</i>	Denied [†]	2007 WL 4877903 (C.D. Cal.)
6/09/07	<i>Lopez v. Gymboree Corp.</i>	Denied	2007 WL 1690886 (N.D. Cal.)
7/20/07	<i>Ehrheart v. Lifetime Brands, Inc.</i>	Denied [†]	498 F. Supp. 2d 753 (E.D. Pa.)
8/22/07	<i>Iosello v. Leiblys, Inc.</i>	Denied	502 F. Supp. 2d 782 (N.D. Ill.)
8/28/07	<i>Korman v. Walking Co.</i>	Denied [†]	503 F. Supp. 2d 755 (E.D. Pa.)
10/17/07	<i>Follman v. Hospitality Plus of Carpentersville, Inc.</i>	Denied	532 F. Supp. 2d 960 (N.D. Ill.)
12/3/07	<i>Ramirez v. MGM Mirage, Inc.</i>	Denied [†]	524 F. Supp. 2d 1226 (D. Nev.)

[†] It is unclear from the decision whether the expiration date, the credit card number, or both were printed. Although their precedential value is dubious, the author includes these cases to be comprehensive.

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Date	Case Name	Disposition	Citation
12/11/07	<i>Ehrheart v. Verizon Wireless</i>	Denied	547 F. Supp. 2d 463 (W.D. Pa.)
12/18/07	<i>Follman v. Village Squire, Inc.</i>	Denied	542 F. Supp. 2d 816 (N.D. Ill.)
2/25/08	<i>Gamaly v. Tumi, Inc.</i>	Denied	2008 WL 512718 (N.D. Cal.)
3/04/08	<i>Miller v. Sunoco, Inc.</i>	Denied	2008 WL 623806 (E.D. Pa.)
3/19/08	<i>Dudzienski v. Gordon Food Serv., Inc.</i>	Denied	2008 WL 4372720 (N.D. Ill.)

APPENDIX B. POST-*IQBAL* § 1681C(G) DECISIONS ON 12(B)(6) MOTIONS TO DISMISS ARGUING FAILURE TO ADEQUATELY PLEAD WILLFULNESS WHERE ONLY THE EXPIRATION DATE WAS PRINTED ON THE RECEIPT AND EXCLUDING ONLINE PURCHASES²²⁹

Date	Case Name	Disposition	Citation
4/05/08	<i>Howard v. Hooters</i>	Granted	2008 U.S. Dist. LEXIS 30776 (S.D. Tex.)
4/14/08	<i>Troy v. Home Run Inn, Inc.</i>	Denied	2008 WL 1766526 (N.D. Ill.)
5/09/08	<i>In re The TJX Cos., Inc., Fair and Accurate Credit Transactions Act</i>	Denied	2008 WL 2020375 (D. Kan.)
1/29/09	<i>Kubas v. Standard Parking Corp. Ill.</i>	Denied	594 F. Supp. 2d 1029 (N.D. Ill.)
3/19/09	<i>Rosenthal v. Longchamp Coral Gables LLC</i>	Granted without prejudice	603 F. Supp. 2d 1359 (S.D. Fla.)
4/22/10	<i>Buechler v. Keyco, Inc.</i>	Denied	2010 WL 1664226 (D. Md.)
5/4/11	<i>Zaun v. Tuttle, Inc.</i>	Denied	2011 WL 1741912 (D. Minn.)
10/12/11	<i>Sanders v. W&W Wholesale, Inc.</i>	Denied	2011 WL 4840978 (N.D. Ill.)
10/18/11	<i>Seo v. CC CJV Am. Holdings, Inc.</i>	Granted	2011 WL 4946507 (C.D. Cal.)
4/27/12	<i>Vidoni v. Acadia Corp.</i>	Granted	2012 WL 1565128 (D. Me.)
3/19/13	<i>Dover v. Shoe Show, Inc.</i>	Denied	2013 WL 1748337 (W.D. Pa.)
5/13/13	<i>Rouse v. Hennepin Cty.</i>	Denied	2013 WL 1969790 (D. Minn.)
9/4/13	<i>Komorowski v. All-American Indoor Sports, Inc.</i>	Granted without prejudice	2013 WL 4766800 (D. Kan.)

229. Practitioners should also be aware of the recent case in the Southern District of New York granting with prejudice a 12(b)(6) motion where the defendant failed to properly truncate the credit card number. *Katz v. Donna Karan Int'l, Inc.*, No. 14 Civ. 740(PAC), 2015 WL 405506 (S.D.N.Y. Jan. 30, 2015). This case is unprecedented in its dismissal, although it remains to be seen whether this case represents an outlier or the beginning of a new trend among federal district courts.

Date	Case Name	Disposition	Citation
6/23/14	<i>Lavery v. RadioShack Corp.</i>	Denied	2014 WL 2819037 (N.D. Ill.)
6/30/14	<i>Crupar-Weinmann v. Paris Baguette Am., Inc.</i>	Granted with prejudice	2014 WL 2990110 (S.D.N.Y.)
11/14/14	<i>Fullwood v. Wolfgang's Steakhouse, Inc. (Fullwood I)</i>	Denied with leave to refile	2014 WL 6076733 (S.D.N.Y.)
12/29/14	<i>Reed v. Swatch Grp. (US), Inc. (Reed I)</i>	Granted without prejudice	2014 WL 7370031 (D.N.J.)
7/23/15	<i>Fullwood v. Wolfgang's Steakhouse, Inc. (Fullwood II)</i>	Denied	2015 WL 4486311 (S.D.N.Y.)
10/01/15	<i>Reed v. Swatch Grp. (US), Inc. (Reed II)</i>	Denied	2015 WL 5822669 (D.N.J.)

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